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Viacom v. YouTube: A Different View on the District Court Ruling

Prof. Jim Gibson, University of Richmond School of Law

July 13, 2010

In [an earlier essay in this series](#), Randy Picker discussed the [recent copyright decision in *Viacom v. YouTube*](#), and in particular the court's ruling that the Digital Millennium Copyright Act's "safe harbor" for remote storage applies to YouTube's online video service. I agree with Randy that the court's interpretation of the DMCA is problematic, but I see a good argument that the outcome is correct and that the ruling should be affirmed on appeal.

Viacom v. YouTube is a hugely important case. It pits the world's fourth-biggest media company against Internet behemoth Google, which purchased YouTube in 2006 for \$1.65 billion. The latest ruling finds that YouTube's core business – the storage, searching, and transmission of user-uploaded video – does not violate copyright law, as long as YouTube expeditiously removes unauthorized copyrighted material when it becomes aware of it. (That's a simplification of the decision, but it will do for present purposes.)

The basis for the court's ruling is the Digital Millennium Copyright Act (the "DMCA"), the federal statute that balances copyright concerns against Internet technologies. In the late 1990s, Congress recognized that lots of relatively routine Internet transactions involve unauthorized copying of copyrighted content. After all, the Internet is essentially a big machine for copying and transmitting information, some of which is copyrighted.

So in 1998 Congress passed the DMCA, which attempts to draw the line between worrisome online infringements that should lead to liability and mere technical infringements that should not. The Act identifies four such technical infringements and establishes [statutory "safe harbors"](#) for the Internet companies that engage in them, essentially insulating online service providers from copyright liability for four distinct kinds of Internet transactions. In *Viacom v. YouTube*, the court held that one of these four safe harbors applied to YouTube: the safe harbor for online "storage," found in Section 512(c) of the DMCA.

The problem is that YouTube does more than merely *store* video. Indeed, its main value derives from its *transmission* of video to Internet users. This is an important distinction for copyright purposes, because copyright law calls that kind of transmission a "performance" – and under certain circumstances a performance of a copyrighted work constitutes infringement, even if no permanent copy is made. The *Viacom* court found that this transmission fit within the storage safe harbor, but that finding is a stretch, for [reasons that Randy Picker has pointed out](#).

So why do I think the court's ruling is defensible? Well, I have a big-picture reason and a more technical, legalistic reason.

Let's look at the big picture first. By the time the DMCA was enacted, the Internet's World Wide Web interface was in full swing, with its combination of text, graphics, and hyperlinks. In addition, courts had begun to address the thorny liability issues that confront website hosts when their users post infringing material.

When Congress passed the DMCA, then, it clearly had in mind much more than remote storage; it also meant to design safe harbors for those who *transmit* copyrighted content. Indeed, the House and Senate reports refer to "World Wide Web sites" and "online site[s] offering audio or

video.” So it would be very odd indeed if the DMCA’s protection were limited to those who host remote storage facilities.

Of course, legislative history is no help if the actual legislation itself says something different. (Indeed, some experts on statutory interpretation would ignore legislative history no matter what it says.) So is there any specific provision *in the DMCA itself* that might protect YouTube?

Here we get to the more technical, legalistic justification for the *Viacom v. YouTube* outcome: the safe harbor for “transitory digital network communications,” found in Section 512(a) of the DMCA. Although the district court did not mention this one, it protects an online service that transmits unmodified copyrighted material, as long as some third party initiates the transmission and chooses the recipient. If we are looking for a statutory safe harbor that goes beyond storage and applies to the sending of copyrighted material from YouTube to an end user, here it is.

Indeed, this distinction between storage and transmission lines up nicely with the way that copyright law generally distinguishes copies from performances. Copyright’s “reproduction” right governs the making of permanent copies – the sorts of copies that a website could store permanently. And copyright’s “performance” right governs fleeting manifestations of copyrighted content – those that disappear from the screen when a transmission ends. We see this same division in the DMCA’s safe harbor, and with good reason; Congress knew that it wanted to protect online service providers from liability for both unauthorized reproduction and unauthorized performance. The DMCA would have been fairly useless if it covered only one of those rights.

In the end, then, an argument that the DMCA does not protect Internet services that store *and transmit* copyrighted content proves too much. If YouTube falls outside the DMCA’s safe harbors because it transmits video, then every website that hosts third-party material is outside the safe harbor as well, because websites transmit their contents to the public just like YouTube transmits video. More important, the companies that host those websites would also be denied DMCA protection. No safe harbors for those that bring us websites, message boards, the Usenet, RSS feeds, and all sorts of other useful Internet technologies? This is not what Congress had in mind, as both the history and the text of the DMCA makes clear.

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